FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
WOLF POINT, MONTANA
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IN RE THE CUSTODY OF
CHERISH MIRANDA YOUPEE,
A Minor Child.

Appeal No. 143

THIS APPEAL came before the Appeals Court from an order entered by Honorable Robert Welch on August 28, 1991, ordering that CHERISH MIRANDA Y0UPEE, a minor Indian child, be returned to the Fort Peck Indian Reservation to be in the custody of her natural father, Marvin K. Youpee, Sr., that the child be made a ward of Fort Peck Tribal Court, and that the natural mother, Cynthia F. Youpee Darnell, be granted reasonable visitation rights with the child.

ARGUED: December 13, 1991
DECIDED: January 3, 1992

APPEARING FOR APPELLANT, CYNTHIA F. YOUPEE DARNELL: Mary L. Zemyan, Attorney at Law p.0. Box 1094 Wolf Point, Montana 59201.

APPEARING FOR APPELLEE, MARVIN K. YOUPEE, SR.: Rene A. Martell, Attorney at Law Montana Legal Services, 204 1st Avenue South, Wolf point, Montana 59201.

AMICUS BRIEF AND ORAL ARGUMENT: Gary M. Beaudry, Attorney at Law, Special Prosecutor, Fort peck Tribes. P.O. Box 1027, poplar, Montana 59255.

CIVIL: THE INTENT OF THE CHILD CUSTODY STATUTE VI CCOJ §304, IS TO ASSURE MINOR CHILDREN FREQUENT AND CONTINUING CONTACT WITH BOTH PARENTS AFTER THEIR PARENTS HAVE SEPARATED OR DIVORCED TO ENCOURAGE PARENTS TO SHARE THE RIGHTS AND RESPONSIBILITY OF CHILD REARING. THE BEST INTERESTS OF THE CHILD WILL BE SERVED BY HAVING THE CHILD RETURNED TO THE FORT PECK INDIAN RESERVATION TO LIVE WITH HER NATURAL FATHER, WITH THE NATURAL MOTHER HAVING REASONABLE RIGHTS OF VISITATION.

OPINION by Gerard M. Schuster, Chief Justice, joined by Gary James Melbourne, Associate Justice and Debra A. Johnson, Associate Justice.

HELD: THE JUDGMENT OF THE LOWER COURT ORDERING THAT CHERISH MIRANDA

YOUPEE, A MINOR INDIAN CHILD, BE RETURNED TO THE FORT PECK INDIAN RESERVATION TO BE IN THE CUSTODY OF HER NATURAL FATHER, MARVIN K. YOUPEE, SR; THAT THE CHILD BE MADE A WARD OF FORT PECK TRIBAL COURT, AND THAT THE NATURAL MOTHER, CYNTHIA F. YOUPEE DARNELL, BE GRANTED REASONABLE VISITATION RIGHTS WITH THE CHILD IS AFFIRMED.

FACTS

Although some of the facts are disputed, we find them to be in summary form as follows:

Marvin K. Youpee, Sr. and Cynthia F. Youpee Darnell were married on September 11, 1982 and divorced on August 22, 1985. Mr. Youpee is an enrolled member of the Fort Peck Tribes. Both parties presently reside on the Fort Peck Indian Reservation, Montana. The child, CHERISH MIRANDA YOUPEE, was born subsequent to the divorce and was enrolled as a member of the Fort Peck Tribes. The divorce decree granted both parties custody of the then unborn child.

In 1986, shortly after the child's birth, Cynthia F. Youpee Darnell moved off the reservation, and placed the child with her father, Luther Clemons and step-mother Phyllis Clemons, who lived in Florida at the time. Ms. Darnell felt that the child would have a better family life environment with the Clemons. The physical custody of the child remains with the Clemons to this date.

The Clemons eventually filed a petition for adoption of CHERISH MIRANDA YOUPEE in York County, Pennsylvania, in October of 1988. An objection to jurisdiction was filed by the Fort Peck Tribes and a request for transfer back to the Fort Peck Indian Reservation was made under the Indian Child Welfare Act. The York County Court granted motions to transfer jurisdiction back to the Fort Peck Tribal Court, citing the ICWA, and no appeal followed.

A major disputed factual issue involved the interpretation of an August, 1988 document modifying the custody provision of the parties' divorce decree. The document included some termination of parental rights language as between Marvin K. Youpee and Cherish. However, Mr. Youpee testified that he did not intend thereby to terminate his parental rights as to this daughter. The document contained some reciprocal language concerning visitation of Cherish and the parties' other child, Marvin K. Youpee, Jr.

In June of 1991, Mr. Youpee filed his petition for permanent custody of Cherish and revocation of the 1988 stipulation referred to above.

The Court entered its Order on August 28, 1991, and this Appeal followed.

The issues to be addressed by the Court are as follows:

1. Whether there was substantial evidence to support the judgment that Marvin K. Youpee, Sr. should be entitled to raise and care for his daughter.

2. Whether the Tribal Court ruling that Appellee did not terminate his

parental rights was supported by substantial evidence.

3. Whether the Fort Peck Tribes have an interest in the matter of the custody of CHERISH MIRANDA YOUPEE under provision of the Indian Child Welfare Act.

I.

The conclusion of the Tribal Court that where a capable parent is available, it is the policy of the Fort Peck Tribes and Tribal Court to have parents raise their children is upheld and affirmed by this Court.

In reviewing this Court's standard of review in cases of this nature, 1 CCOJ §202 provides:

> "The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court. The Court of Appeals shall review de novo all determinations of the Tribal Court on matters of law, **but shall not set aside any factual determinations of the Tribal Court if such determination are supported by substantial evidence...."** (emphasis made)

The Lower Court here made specific findings which we find were supported by substantial evidence:

1. Appellee, Marvin K. Youpee, testified that, through his attorney, he requested that Cherish be returned in August of 1987, and was frustrated in his attempts to have parental contact with the child.

2. A home study of the Appellee was conducted in July, 1991, by Tom Christian, a BIA Social Services representative. Mr. Christian stated that he would have no concerns if Appellee's daughter were returned to him.

3. Credible witnesses testified that Appellee is a capable and loving parent.

4. Appellant testified that Cherish was left with the Clemons because she could not adequately provide for the child.

5. Relinquishment of Cherish by the Appellant to the Clemons, living in Florida and later Pennsylvania, effectively denied the Appellee his visitation rights for 5 years.

The code involved is VI CCOJ §304(b) which reads in part:

"In determining the best interests of the child, the Court shall consider the relative ability of the parents to provide adequate food, clothing, shelter, medical care, love and emotional support and day-to-day supervision. The

> Court shall also take into account the desires of the child. Difference in financial means alone shall not be the deciding factor."

This Court has consistently upheld a strong value on maintaining appropriate parent-child relationships. The preferred disposition in placement of a child is with parents and the purpose of this disposition is to keep the family together. **IN RE THE CUSTODY OF R.F. AND J.F., MINORS, FORT PECK COURT OF APPEALS, NO. 80, 1990.** In **BAUER vs. BAUER, Fort Peck Court of Appeals No. 59, 1989**, the Court stated that the intent of the child custody statute at VI CCOJ §304 was to assure minor children "frequent and continuing contact with both parents after their parents have separated or divorced to encourage parents to share the rights and responsibility of child rearing". **BAUER, page 13.** The decision of the presiding Judge in a controversy affecting rights to custody of a child of tender years ought not be overturned on appeal except upon a clear showing of abuse of judicial discretion. **Ex Parte Bourquim** 290 P2d 250 (Montana 1930).

In conclusion, we find that the lower Court's factual determinations regarding the minor child are supported by substantial evidence, and we will not set these aside.

II.

It is sound public policy and the policy of this jurisdiction that parents cannot freely terminate their obligations to their children. Although a parent may voluntarily petition the Court to terminate parental rights under **V CCOJ §402**, this section must be considered in conjunction with the preceding section **401**, which states that such termination of rights shall only be done in conjunction with a pending adoption proceeding. **V CCOJ §401.** In the present case, Marvin K. Youpee Sr. apparently signed a document reaffirming his agreement to terminate his parental rights to his daughter, but no adoption was finalized. REF. **OPINION IN RE ADOPTION OF CHERISH MIRANDA YOUPEE, COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA, MAY 1991.** We find no order of a Court terminating Appellee's parental rights, and such termination would be accomplished only in conjunction with an adoption proceeding in the Tribal Court, **V CCOJ §401, 402, supra.** Again, the Tribal Court had before it substantial evidence that Appellee's parental rights were not terminated, as there is no order terminating such rights.

III.

A third issue involves the interest of the Fort Peck Tribes in this matter. Clearly, the policy considerations of the Indian Child Welfare Act as discussed in **Mississippi Band of Choctaw Indians vs. Holyfield**, 490 U.s. 30, 104 L.Ed 2d 29 (April 3, 1989) are applicable here, as summarized in the Amicus Brief of counsel for the Tribes:

> 1. The ICWA specifically confers standing on the Indian Child's tribe to participate in child custody adjudications. Holyfield 104 L Ed 2d 29; fn. 12.

2. ". . .that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children..." Holyfield 104 L Ed 2d 29, 38.

3. The ICWA "seeks to protect the rights of the Indian child as an Indian and rights of the Indian community and tribe in retaining its children in its society." Holyfield 104 L Ed 2d 29, 39.

4. In Holyfield the Supreme Court specifically adopted the holding of the Utah Supreme Court in Re Adoption of Halloway, 732 p 2d 962 (Utah 1986), that Congress in the ICWA expressed a federal legislative judgment that Indian tribes have an interest in their children which is distinct from but on parity with the interests of the parents and that the interest of the tribes in custodial decisions are entitled to respect as the interest of the parents.

The Tribes consider its members and its children as vital resources to the continued existence and integrity of the tribes.

There is no question that the Tribes have an important interest in having this child returned to Fort Peck Indian Reservation to reside with her family.

Finally, as with the Court of Common Pleas of York County, Pennsylvania, we are not insensitive to the impact on the child in her return to the reservation. **AGAIN, WE CONSIDER IT ESSENTIAL THAT THE CHILD REMAIN A WARD OF FORT PECK TRIBAL COURT, AND THAT THE NATURAL MOTHER HAVE REASONABLE RIGHTS OF VISITATION WITH THE CHILD.**

DATED this _____ day of January, 1992.

BY THE COURT OF APPEALS:

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GERARD M. SCHUSTER, Chief Justice

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DEBRA A. JOHNSON, Associate Justice

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GARY JAMES MELBOURNE, Associate Justice